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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ROOTS READY MADE GARMENTS CO.
W.L.L.,

Plaintiff,

v.

THE GAP, INC., a/k/a, GAP, INC., GAP
INTERNATIONAL SALES, INC., BANANA
REPUBLIC, LLC, AND OLD NAVY, LLC,

Defendants.

Case No: C 07 3363 (CRB) (WDB)

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER

Date: August 6, 2008

Time: 1:30 p.m.

Place: Courtroom 4, 3rd Floor

Judge: Wayne D. Brazil

PUBLIC VERSION

1 In the Spring of 2004, Roots, with Gap's approval, began selling Gap OP and ISP
 2 merchandise through its own retail stores in Qatar, and to another retailer in the UAE. *Id.* ¶¶ 82-
 3 87. Although these initial stores were successful, Gap began to stall in approving new retailers
 4 and territories in which Roots could sell. On August 10, 2005, Gap terminated Roots' access to
 5 first-line ISP merchandise in breach of the oral agreement. *Id.* ¶¶ 102-103. Roots attempted to
 6 negotiate a business resolution with Gap. Ultimately, those settlement discussions were
 7 unsuccessful, and Gap filed this action on June 26, 2007.¹ *Id.* ¶¶ 105-108.

8 *Gap Denies Having A Direct Business Relationship with Roots*

9 The discovery conducted thus far shows that the parties' two-year course of
 10 performance is fully consistent with the existence of the oral contract alleged in Roots'
 11 complaint. In particular, Gap was fully aware of, and approved, Roots' resale of ISP
 12 merchandise both in its own stores in Qatar and to another approved retailer in the UAE. In
 13 addition, Roots' representatives regularly corresponded and met with Gap executives to discuss
 14 the ISP business and Roots' plans for entering additional markets.

15 From the inception of this case, however, Gap has steadfastly denied the
 16 existence of any direct contractual relationship between Gap and Roots. *See, e.g.*, Dep. of Ron
 17 Young (Gap's 30(b)(6) witness) Nash Decl., Ex. 2, at 81:10-12 ("[REDACTED]
 18 [REDACTED]"); *id.* at 89:22-23 ("[REDACTED]"); *accord* Dep. of Jim Bell at 118:23-25, Nash Decl., Ex. 3
 19 [REDACTED]
 20 ([REDACTED]). Gap argues that Roots was
 21 merely a retailer authorized to purchase ISP merchandise from a Gap distributor, Gabana Gulf
 22 Distribution Ltd., for resale exclusively in Roots' retail stores in Qatar.

23
 24
 25 ¹ Roots amended its complaint on July 27, November 16, and February 29. On April 28,
 26 Judge Breyer denied in its entirety Gap's motion to dismiss Roots' Third Amended Complaint,
 27 directing the parties to complete discovery on all of Roots' claims.

1 *Roots Notices the Deposition of Don Fisher*

2 On May 21, 2008, Roots noticed the deposition of Gap's founder, Don Fisher.
3 Darling Decl., Ex. A. Mr. Fisher has first-hand knowledge concerning highly material facts
4 relating to Gap's business relationship with Roots. The record shows that Mr. Fisher had a face-
5 to-face meeting with Roots' CEO, Ashraf Abu Issa, in 2004. Abu Issa Decl. ¶ 2. During this
6 meeting, which lasted approximately 45 minutes, Messrs. Fisher and Abu Issa discussed, *inter*
7 *alia*, the success of Roots' ISP operations in Qatar and the UAE; Roots' projected sales and
8 store openings in the region; and Gap's current and future relationship with Roots. *Id.* ¶¶ 3-5.
9 At the end of the meeting, Mr. Fisher contacted Andrew Rolfe, then the president of Gap's
10 international division, to set up another face-to-face meeting with Mr. Abu Issa to discuss the
11 parties' business relationship. *Id.* ¶ 6. *See also* Excerpt from Abu Issa Dep., Darling Decl.,
12 Ex. 6.

13 On May 23, Gap demanded that Roots withdraw the notice of deposition,
14 incorrectly stating that Mr. Fisher "has absolutely nothing to do with this case, and has no
15 knowledge of Gap's business with Roots." Darling Decl., Ex. C. On June 12, Roots responded
16 that the recent deposition of Ashraf Abu Issa demonstrated that Mr. Fisher had first-hand
17 knowledge of highly material facts concerning the business relationship between Roots and
18 Gap. Darling Decl., Ex. D. Notwithstanding this proffer, Gap refused to make Mr. Fisher
19 available for a deposition, and instead filed this motion for a protective order.

20 **ARGUMENT**

21 "It is very unusual for a court to prohibit the taking of a deposition altogether[,]
22 and absent extraordinary circumstances, such an order would likely be in error." *Celerity, Inc.*
23 *v. Ultra Clean Holding, Inc.*, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). Gap seeks to
24 bar Roots from taking the deposition of Mr. Fisher for the sole reason that he is a senior
25 corporate executive. But the law does not provide senior executives in possession of material
26 information with immunity from testifying. To the contrary, where, as here, "a corporate officer
27 has first-hand knowledge of important, relevant, and material facts in the case the deposition
28

1 should be allowed.” *First Methodist Church of San Jose v. Atlantic Mut. Ins. Co.* 1995 WL
 2 566026, at *2 (N.D. Cal. Sept. 19, 1995); *see also Google Inc. v. American Blind & Wallpaper*
 3 *Factory*, 2006 WL 2578277, at *3 (N.D. Cal. Sept. 6, 2006) (granting motion to compel
 4 deposition of founder and CEO of Google Inc.); *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429
 5 (9th Cir. 1975) (concluding that plaintiff “should be permitted to proceed” with deposition of
 6 highest officer of defendant corporation who had first-hand knowledge of material facts).²

7 The evidence concerning Mr. Fisher’s face-to-face meeting with Roots’ CEO
 8 demonstrates that Mr. Fisher has unique “first-hand knowledge” concerning the business
 9 relationship between Gap and Roots. Gap attempts to diminish the relevance of Mr. Fisher’s
 10 testimony by characterizing the meeting as a “meet and greet,” or an “exchange of pleasantries.”
 11 Defs. Mem. at 1, 3. The evidence, however, indicates that Abu Issa and Mr. Fisher engaged in a
 12 45-minute substantive discussion regarding Roots’ current and projected sales of Gap
 13 merchandise in the Middle East. Abu Issa Decl. ¶¶ 3-4. Mr. Fisher demonstrated awareness of
 14 Roots’ ISP operations, and asked Mr. Abu Issa questions about Roots’ business strategy, and
 15 about how other brands are distributed in the Middle East. *Id.* ¶¶ 4-5. The discussion made
 16 such an impression on Mr. Fisher that during the meeting, he called the president of Gap’s
 17 international division to arrange another meeting to explore future opportunities for the Gap-
 18 Roots relationship. *Id.* ¶ 6. The meeting was clearly more than an “exchange of pleasantries.”
 19

20 ² The cases cited by Gap are easily distinguished. Two of Gap’s cases concern proposed
 21 depositions of executives who, unlike Mr. Fisher, lacked first-hand knowledge of relevant facts.
 22 And even in that context, the courts did not foreclose the deposition in the event that other
 23 methods of discovery proved inadequate. *See Baine v. General Motors Corp.*, 141 F.R.D. 332,
 24 335-36 (M.D. Ala. 1991) (granting protective order where executive lacked “superior or unique
 25 personal knowledge,” without prejudice to plaintiff right to take his deposition “should the
 26 alternative discovery devices . . . prove inadequate”); *Celerity*, 2007 WL 205067, at *5 (granting
 27 motion for protective order where senior executives had no “firsthand and non-repetative
 28 knowledge” regarding relevant issues, but permitting plaintiff to “renew” the deposition notice
 at a later time if other means of discovery “prove inadequate”). The third case, *Community
 Federal Savings & Loan Association v. Federal Home Loan Bank Board*, 96 F.R.D. 619
 (D.D.C. 1983), concerns the deposition of government agency officials, not corporate
 executives, and involves a different set of considerations.

1 The fact of Roots' meeting with Mr. Fisher and its substance are of singular
2 importance to Roots' claims, for Gap has repeatedly denied the existence of any direct business
3 relationship with Roots. *See supra* at 3. Gap's promise not to dispute Mr. Abu Issa's testimony
4 regarding the meeting, Defs. Mem. at 3, does not eliminate Roots' need to take Mr. Fisher's
5 testimony. Roots should be permitted to examine Mr. Fisher concerning, among other things,
6 the substance of the meeting, his understanding of the relationship between Roots and Gap, and
7 what if any actions he took (or directed others at Gap to take) as a result of the meeting.

8 **CONCLUSION**

9 For the reasons stated above, Defendants' Motion for a Protective Order should
10 be denied.

11
12 Respectfully submitted,

13
14 Dated: July 16, 2008

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